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TO : Paula Williams, Director
Office to Tribal Self-Governance

FROM : Barbara Hudson, Attorney
Office of the General Counsel

SUBJECT : Unresolved Issues in Annual Funding Agreements

I am becoming concerned about the agency's legal liability with respect to issues left unresolved in annual funding agreements (AFA) entered pursuant to Title III of the Indian Self Determination Act (ISDA). Generally, the problem occurs where a Tribe states that it does not agree with a particular amount or inserts a footnote in the AFA that a particular line item is unresolved. For example, in the Chickasaw FY 1997 AFA, the Tribe states,

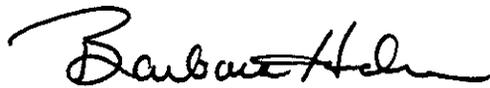
The Indian Health Service and the Chickasaw Nation **do not agree** on the amount of equipment replacement funding. The Chickasaw amount of \$222,971 is contained within the AFA Headquarters/Tribal Shares Formula line item It is the position of the Indian Health Service the FY 97 amount for equipment replacement is \$202,413, and is agreeing to pay a total Headquarters Tribal Shares/Formula amount of \$1,464,732.

(Emphasis added.) Section 303 of ISDA authorizes the IHS to enter written funding agreements with eligible Tribes. Black's Law Dictionary defines agreement as "a coming or knitting together of minds; a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties." (Black's Law Dictionary). Thus, where there is no meeting of the minds, there is no agreement. In such a case, the parties would have no corresponding rights and duties with respect to areas of disagreement. In the above example, there is no meeting of the minds with respect to the funding which IHS will provide to the Tribe for assuming the function associated with equipment replacement. Rather, both the Tribe and the IHS have stated their positions as to the amount payable for assuming this function. The statute requires agreement on the amount of funding in order for a Tribe to assume a program or function. Without this agreement, the Tribe has no right to assume the program or function and IHS has no authority to transfer any funds to the Tribe for that program or function.

Where a specific amount is not agreed to for assumption of a program or function (including administrative support functions funded by tribal shares) in an FY 1997 AFA, I would suggest that agency type "unresolved" by the particular issue and add the following language to the AFA:

The Tribe and IHS are unable to reach agreement on certain programs or functions which the Tribe proposed to assume. These programs or functions have been noted in the margin of the AFA as "unresolved". The term unresolved means that there has been no meeting of the minds with respect to funding for assuming a particular program or function. The IHS and the Tribe will continue to negotiate with respect these unresolved issues. However, until such time as an agreement is reached, the Tribe has no right or duty to assume the program or function, and IHS has no authority to transfer any funds to the Tribe for carrying out the function.

It is important that the agency make payment to the Tribe **only** for those programs or functions where there has been "agreement" between IHS and the Tribe for a specified level of funds. Permitting a Tribe to assume a program or function where there is no agreement of the parties may expose the agency to substantial litigation risks in the future.



Barbara Hudson

cc: Assistant Regional Attorneys

Les Morris
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